1993

Toby Scott Slingerland v. Douglas M. Baum : Brief of Appellant

Utah Court of Appeals

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David R. Olsen, Esq.; Jesse C. Trentadue, Esq.; Paul M. Simmons, Esq.; Suitter, Axland, Armstrong and Hanson; Attorneys for Plaintiff/Appellee.

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DOCKET NO. 930172

IN THE UTAH COURT OF APPEALS

TOBY SCOTT SLINGERLAND,	)	
	)	
Plaintiff/Appellee,	)	Case No. ~~930029~~ ~~920873-CA~~ ~~920900571PI~~ 930172-CA
	)	
vs.	)	
	)	
DOUGLAS M. BAUM,	)	
	)	
Defendant/Appellant,	)	

priority #15

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG

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IN THE UTAH COURT OF APPEALS

TOBY SCOTT SLINGERLAND, Plaintiff/Appellee, vs. DOUGLAS M. BAUM, Defendant/Appellant,	)	Case No. 930029 920873-CA 920900571PI

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to § 78-2-2 Utah Code Annotated (1953 as amended).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court err and abuse its discretion in failing to set aside the Default Judgment entered against Appellant Douglas M. Baum (hereafter Baum) in favor of Appellee Toby Slingerland (Slingerland) under the circumstances of Baum's mistaken understanding of the situation and excusable neglect at the time the Default was entered and in light of the fact that Slingerland did not claim prejudice should the Default be set aside.

The standard of review is whether or not under the circumstances the trial court abused its description in denying Baum's Motion to Set Aside the Default and Default Judgment. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989).

RULES AND STATUTES WHICH ARE DETERMINATIVE OF THE ISSUES SET FOR REVIEW

Rule 60(b) Utah Rules of Civil Procedure (set forth in the Addendum).

STATEMENT OF THE CASE

This action is a personal injury claim filed by Slingerland against Baum resulting from a one-car rollover causing serious injury to Slingerland. Slingerland filed his action against Baum on January 31, 1992 (R. 2-4), and a Default was entered against Baum on May 18, 1992 (R. 9). On June 16, 1992, a hearing was held

on the issue of damages, as a result of which a Default Judgment was entered against Baum in the amount of $5,623,839.00. (R. 17-19). On September 11, 1992, Baum filed a timely Motion to Set Aside the Default and Default Judgment. (R. 169-170). Subsequent to Memoranda having been filed and reviewed by the court, the court denied Baum's Motion to Set Aside the Default. (R. 207, 218-220).

STATEMENT OF FACTS

1. June 1, 1991--Baum and Slingerland made a late night trip from Salt Lake City to Wendover, Nevada. Both Baum and Slingerland had gone a substantial period of time without sleep prior to their return trip to Salt Lake City and both were very tired. Baum and Slingerland mutually decided to have Baum drive back home. Slingerland put his seat back, took off his seat belt, and went to sleep. Shortly before the accident Slingerland woke up, noted that Baum had fallen asleep, yelled at Baum, Baum over-corrected his steering, the vehicle went down a ravine, and rolled causing injury to Slingerland. (R. 0256-0257).

2. Shortly after the accident Baum contacted USF&G Insurance Company (USF&G) notifying them of the accident and requesting coverage. USF&G informed Baum that they would not cover this accident. (R. 177).

3. January 31, 1992--Slingerland filed a lawsuit against Baum seeking damages for injuries sustained in the accident. (R. 2-4).

4. Baum had never before been involved in any litigation, was unsophisticated in connection with legal matters and did not have a very good understanding of how the legal process works. (R. 177).

5. Baum discussed the matter of the lawsuit with an attorney who informed him that under the circumstances, Baum was probably liable and that his best option may be to file bankruptcy. Baum also spoke to Slingerland's attorney and as a result of such conversations was of the impression and understanding that Slingerland's attorney would try to work things out with Baum's insurance company to satisfy Slingerland's claim. (R. 177).

6. Subsequently, Baum was served with a Summons and Complaint. Baum did not inform anyone concerning service of the Summons and Complaint due to the fact that Baum was of the understanding that he had no insurance coverage and therefore, no viable options, and due to the emotional stress of being sued by his best friend who was now a paraplegic. As a further result of discussions with an attorney and Slingerland's attorney, Baum was in a confused state of mind and did not know what he should do. Under the circumstances, as a result of a mistake in judgment and excusable neglect, Baum took no action to respond to the Summons and Complaint. (R. 177).

7. May 18, 1992--Default was entered against Baum. (R. 9).

8. June 16, 1992--Subsequent to a two-hour hearing, a Default Judgment was entered against Baum in the amount of $5,623,839. (R. 234-313, and R. 17-19).

9. Shortly before the hearing of June 16, 1992, USF&G, which was in the process of preparing for a declaratory action on the issue of coverage for Baum, was informed that a Default had been entered against Baum and that a hearing would be held on the issue of damages. USF&G retained the services of Gary Johnson who appeared at the hearing of June 16, 1992 on behalf of USF&G, to monitor the hearing. Mr. Johnson did not take part in the hearing. (R. 237-238).

10. July 9, 1992--A Declaratory Action was filed in the United Stated District Court, District of Utah, Civil No. 2-92-CV-611J concerning the issue of insurance coverage for Baum in connection with the accident.

11. September 11, 1992--Counsel had been retained for Baum by USF&G and a Motion to Set Aside the Default and Default Judgment was filed with an accompanying Memorandum of Authorities and Affidavit of Douglas M. Baum. (R. 169-170, 171-175, and 176-179).

12. Baum's Motion to Set Aside the Default and Default Judgment was based upon the fact that Baum took no action to prevent judgment to be entered against him due to his emotional and confused state and his mistaken understanding that he had no viable options at the time. Baum in the furtherance of justice and equity requested that the Default be set aside and that he be given the opportunity to defend the issue of sole liability and the damage claims. (R. 169-170, 171-175, and 176-179).

13. September 22, 1992-- Slingerland filed a Memorandum opposing setting aside the Default, asserting claims and arguments

against USF&G and not Baum, as a basis for opposing setting aside the Default. (R. 180-196).

14. Slingerland in his Motion opposing setting aside the Default, did not claim that he would be prejudiced should the Default be set aside. (R. 180-196).

15. September 28, 1992--Baum filed a Response Memorandum in support of setting aside the Default. (R. 197-201). Baum also filed a Request for Hearing on the matter. (R. 202-203).

16. October 19, 1992--The court denied Baum's Motion to Set Aside the Default and Default Judgment. The court also denied Baum's Request for Oral Argument. (R. 0207).

17. October 21, 1992--Baum filed a Rule 52 Motion and Objection in connection with the proposed Order seeking entry of specific Findings of Fact and Conclusions of Law, requesting that the court provide further details as to what facts and law the court relied on in its denial of Defendant's Motion to Set Aside the Default and Default Judgment. (R.210-211).

18. December 1, 1992--The court signed an Order denying Baum's Objection to the proposed Order and request for entry of Findings of Fact and Conclusions of Law. (R. 217-219).

19. December 21, 1992--Baum filed the Notice of Appeal. (R.-221).

SUMMARY OF ARGUMENT

It is a well established principle of law that justice requires both sides of a controversy to have a fair opportunity to be heard. Rule 60(b) of the Utah Rules of Civil Procedure

recognizes that at times Defaults will be entered under circumstances where justice dictates and requires that the Default be set aside. In this case, the trial court abused its discretion in failing to set aside the Default. The Motion to Set Aside the Default and Default Judgment was timely made. Baum's mistaken understanding, confusion and emotional distress at the time the Default was entered constitutes grounds as mistake or excusable neglect under Rule 60(b) to set the Default aside. Plaintiff did not claim prejudice should the Default be set aside. Baum has a good faith defense that Slingerland's injuries are not 100 percent the fault of Baum and that Slingerland should be responsible for his proportionate share of fault.

ARGUMENT

THE TRIAL COURT ERRED AND ABUSED ITS DESCRIPTION IN FAILING TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT ENTERED AGAINST DOUGLAS M. BAUM

POINT I

THE MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT WAS TIMELY FILED

Rule 60(b) of the Utah Rules of Civil Procedure requires that a Motion to Set Aside a Default and Default Judgment which was entered due to mistake, inadvertence, or excusable neglect must be filed not more than three months after the Judgment was entered. The Default Judgment in this matter was entered on June 16, 1992. The Notice of Appeal was filed on September 11, 1992, within the required 90 days.

POINT II
DEFAULT JUDGMENTS ARE IN DISFAVOR AND DO NOT MEET THE ENDS OF JUSTICE

The courts in Utah have traditionally disfavored the entry of Judgments by Default for the obvious reason that both sides of the controversy have not been heard. Entry of Judgment by Default denies a defendant the chance to present his side of the story, to present a defense, and to fairly and equitably examine a plaintiff's damage claims.

In Westinghouse Electric Supply Company v. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975), the court held:

> . . . But it is even more important to keep in mind that the very reason for the existent of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse unless it will result in substantial prejudice or injustice to the adverse party. (Emphasis added).

In Heathman v. Fabin & Clendenin, 377 P.2d 189, 190, 14 Utah 2d 60 (Utah 1962), the court held:

> Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts in the interest of justice and fair play favor, where possible, a full and complete opportunity for a hearing on the merits of every case.

In May v. Thompson, 677 P.2d 1109 (Utah 1984), a case involving an 18 year old defendant who also, through some confusion and mistake, allowed a Default Judgment to be entered against him, the court held:

> We are aware also of a principle that if default is issued when a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. . . . We are of the opinion that the ends of justice require an opportunity for the defendant to have his day in court.

In Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981), the court held:

> The decision to relieve a party from a final judgment under Rule 60(b)(1) is subject to the discretion of the trial court. But discretion should be exercised in furtherance of justice and should incline toward granting relief in a doubtful case to the end that the party may have a hearing. Warren v. Dickson Ranch Company, 123 Utah 416, 260 P.2d 741 (1953). We reiterated in Olsen v. Cummings, Utah, 565 P.2d 1123 (1977), the statement made by the court in Mayhem v. Standard Gilsonite Company, 14 Utah 2d 52, 376 P.2d 951 (1962) that "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set it aside." . . . We hold that the lower court abused its discretion in refusing to set aside the default judgment under the circumstances presented in this case. (Emphasis added).

Under the circumstances of this case, justice and equity demand that the Default be set aside and that Baum be allowed to have his day in court. At the time the Default was entered, Baum was a young man 22 years of age with no experience in the legal system. He was suffering emotional distress, due to being sued by his best friend who was now paraplegic as a result of an automobile accident in which Baum was the driver. Baum was in a state of confusion, partly as a result of conversations with attorneys, one

of whom advised him that he had little option but to declare bankruptcy, and Slingerland's attorney who advised him that action was being taken with USF&G on the issue of coverage and payment of Slingerland's claim. Previously, he had been informed by USF&G that they would not cover him in connection with this accident and he certainly did not think he could provide his own defense. It is not difficult to see that at the time, Baum mistakenly felt that he had no options, but to do nothing. Baum's confused state of mind under the circumstances constitutes "excusable neglect." Appellant respectfully submits that Rule 60(b) was intended specifically for persons such as Baum who, because of their inexperience and confusion, mistaken judgment and excusable neglect, have allowed a Default Judgment to be entered against them, but where equity and justice favor allowing such as defendant, who has made a timely request to set the default aside, to have his day in court.

It is important to note that the court's basis for denying Baum's Motion to Set Aside the Default and Default Judgment was that:

> All concerned were aware of the proceedings, or reasonably could have been with proper attention . . . (R. 0207).

Appellant respectfully submits that the court's Ruling is in error. The fact that a defendant was aware of the proceedings and in hindsight "could" have responded, can be equally applied to every party seeking to set aside a Default. Under the trial court's standard, (the fact that a defendant was aware of a pending

Complaint and "could" have responded,) no Default would ever be set aside and Rule 60(b) would become meaningless.

Although Baum arguably "could" have taken action to prevent the entry of Default, the fact remains that he did not take any action due to his emotional state and confusion and to his mistaken understanding of the situation which, under the circumstances, constitute excusable neglect within the intent of Rule 60(b).

POINT III

PLAINTIFF WILL NOT BE PREJUDICED IF THE DEFAULT JUDGMENT IS SET ASIDE

In Westinghouse Electric Supply Company v. Larsen Contractor, Inc., infra, the court stated in part:

> . . . Courts generally tend to favor granting relief from default judgment where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party. (Emphasis added).

It is significant to note that at no time in plaintiff's Memorandum Opposing Setting Aside the Default did Slingerland claim or allege or offer any evidence of "prejudice" should the Default be set aside. (R. 180-196). It would be improper and untimely for Appellee to raise the issue of prejudice for the first time now on Appeal.

POINT IV

BAUM HAS A MERITORIOUS DEFENSE TO SLINGERLAND'S CLAIM

Although this court has held that the merits of a case should not be an issue in a Motion to Set Aside a Default (Board of

Education v. Cox, 14 Utah 2d 385, 384 P.2d 806 (Utah 1963) and Larsen v. Collina, 684 P.2d 52 (Utah 1984)), it should be noted that Baum does have a meritorious defense that justice require he be allowed to present. The fact is that both Baum and Slingerland had been out late at night and without sleep for a substantial period of time on a trip to Wendover. As a result of this activity and outing, Slingerland and Baum were both very tired and by mutual decision decided to return home without any rest or sleep. Slingerland had been angry that in the past he was always having to drive his car and insisted on this trip that Baum do the driving. (R. 0256-0257). Instead of taking steps to assist Baum in staying awake, Slingerland took off his seat belt, put his seat back, and went to sleep. As he woke up and noticed that Baum had apparently fallen asleep, Slingerland exacerbated the situation by yelling, thus apparently startling Baum, resulting in Baum over-correcting in attempting to keep the vehicle under control which resulted in the accident and injuries to Slingerland.

Baum should be given the opportunity to have a jury assess the relative fault of Baum and Slingerland in their mutual decision to spend a considerable amount of time staying awake, their mutual decision to drive back to Salt Lake from Wendover without sleep and to weigh the subsequent actions of the parties, which eventually resulted in the accident causing Slingerland's injuries.

Further, as to economic damages and future medical care, the court based its $4.6 million special damages award on the brief testimony of Paul Randle (R. 0242-0252) which was accepted without

significant inquiry by the court and without any cross-examination. Finally, Slingerland's serious injury likely would not have occurred had he been wearing his seat belt.

Justice and equity require that Baum be given an opportunity to provide a defense to this claim to have the jury assess the relative fault of the parties, and to appropriately examine Slingerland's damage claims.

POINT V

SLINGERLAND'S ATTACKS AGAINST USF&G WERE IMPROPER

In response to Baum's Motion to Set Aside the Default and Default Judgment, Slingerland filed a Memorandum entitled "Memorandum in Opposition to USF&G's Motion to Set Aside Default and Default Judgment." (Emphasis added). Slingerland then argues in his Memorandum that "USF&G" has failed to meet the requirements necessary to set aside a Default, that "USF&G" has not met its burden to show that the Default was entered as a result of a mistake, etc., that "USF&G's" Motion was untimely, that "USF&G" has failed to meet its burden to show that Baum has a meritorious defense, and that "USF&G" has failed to meet any of the requirements necessary to set aside a Default under Rule 60(b)(7). (R. 180-196). Slingerland then argues that "USF&G's" attorney, Gary Johnson, appeared at the damages hearing of June 16, 1992, that "USF&G," therefore, had the opportunity to participate in the damage hearing and refused to do so.

This line of argument is a classic example of setting up and then knocking down a "straw man." The Motion to Set Aside the Default was filed by Baum not USF&G. USF&G was not a party to that Motion, nor did it have any involvement in that Motion other than retaining counsel for Baum, presumably under its obligations to defend its insured even when there is a dispute as to coverage. Slingerland, in his Memorandum, continually attacks "USF&G" in connection with setting aside the Default and for its failure to affirm coverage for Baum in connection with the accident. Slingerland blatantly and erroneously asserts that the Motion to Set Aside the Default and the arguments in favor of said Motion were all made by "USF&G" and not Baum. (R. 180-196).

Not only were Slingerland's "straw man" attacks against USF&G improper, apparently they were also successful. In denying Baum's Motion for the entry of Findings of Fact and Conclusions of Law, the trial court stated:

> The court declines to further enter Findings of Fact and Conclusions of Law. Mr. Olsen's response [the Memorandum attacking USF&G] in behalf of the plaintiff is sufficient. (R. 0217).

The trial court erred and abused its discretion in failing to set aside the Default and Default Judgment against Baum under the provisions of Rule 60(b) and compounded that error by stating that the basis for denying Baum's Motion was Slingerland's "straw man" attack against USF&G, a non-party in this case.

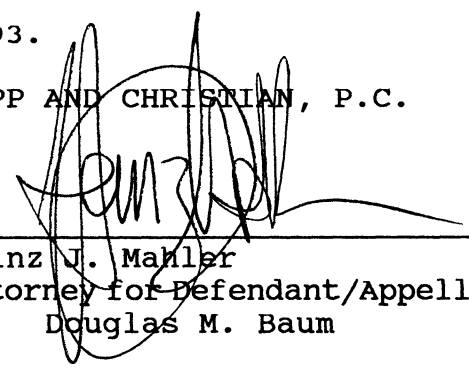
CONCLUSION

The Default and Default Judgment in this case, entered against Baum in the amount of almost $6 million, took place at a time that Baum was emotionally distraught, extremely confused and of the mistaken understanding that he had no choice and no options other than to do nothing. Due to this excusable neglect, the Default Judgment was entered against him. When informed of his mistake, Baum filed a timely Motion to Set Aside the Default and Default Judgment. Slingerland never claimed prejudice should the Default be set aside and instead, proceeded with attacks against USF&G as a basis for denying Baum's Motion.

The courts in Utah have always disfavored Default Judgments. In this instance, Baum should have the opportunity to defend the claim of sole liability for Slingerland's injuries and damages. Rule 60(b) was intended for situations such as Baum's and the trial court erred and abused its discretion in failing and refusing to set the Default and Default Judgment aside.

DATED this 26th day of March, 1993.

KIPP AND CHRISTIAN, P.C.



Heinz J. Mahler
Attorney for Defendant/Appellant
Douglas M. Baum

ADDENDUM

1. Rule 60(b)
2. Default Certificate
3. Judgment
4. Motion to Set Aside Default and Default Judgment
5. Memorandum of Authorities in Support of Motion to Set Aside Default and Default Judgment
6. Affidavit of Douglas M. Baum
7. Memorandum in Opposition to USF&G's Motion to Set Aside Default and Default Judgment
8. Response Memorandum to Plaintiff's Memorandum Opposing Setting Aside Default and Default Judgment
9. Minute Entry Denying Motion to Set Aside Default and Default Judgment
10. Order Denying Motion to Set Aside Default and Default Judgment
11. Objection to Proposed Order
12. Minute Entry Denying Defendant's Objection to Proposed Order
13. Order Denying Defendant's Objection to Proposed Order
14. Notice of Appeal

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26th day of March, 1993, I caused a true and correct copy of the foregoing Appellant's Brief to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
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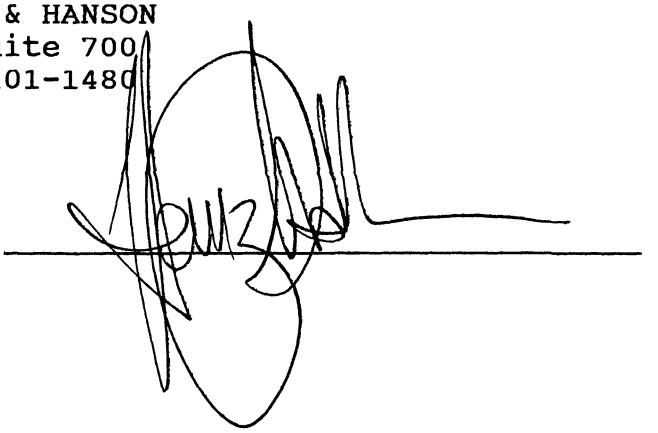

Tab 1

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tab 2

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	)	DEFAULT CERTIFICATE Civil No. 92-0900571PI Judge: Leslie A. Lewis

The defendant, DOUGLAS M. BAUM, having been regularly served with process in this action, and having failed to appear and answer the plaintiff's Complaint on file herein, and the time allowed by law for answering having expired, the default of defendant, DOUGLAS M. BAUM, is hereby entered according to law.

ATTEST my hand, and the seal of this Court, this 18 day of May, 1992.

Craig E. Ludwig
Clerk

By: Pauline Matheson
Deputy Clerk

DRO18.94

Tab 3

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

2175238
6-19-92-817am

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	JUDGMENT Civil No. 920900571PI Judge: David S. Young

This matter came on for trial June 16, 1992 on the issue of damages. The Court heard the testimony of witnesses and received exhibits. Plaintiff waived the need for the Court to make Findings of Fact and Conclusions of Law. Now, being fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff Toby Scott Slingerland is awarded judgment against the defendant Douglas M. Baum as follows:

Special damages:	$4,623,839.00.
General damages:	$1,000,000.00.
Total damages:	$5,623,839.00.

This judgment shall bear interest at the rate of 12% per annum from the date of entry until paid in full.

DATED this 17th day of June, 1992.

DAVID S. YOUNG
Judge, Third District Court

Tab 4

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	:	MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT Civil No. 920900571PI Judge David S. Young

Defendant, Douglas M. Baum, by and through his counsel, Heinz J. Mahler, Esq., of Kipp and Christian, P.C., hereby moves this court pursuant to the provisions of Rule 60(b)(1)(7), Utah Rules of Civil Procedure, to set aside the default and default judgment entered on or about June 16, 1992.

This Motion is based upon the accompanying Memorandum of Authorities and Affidavit of Douglas M. Baum which establishes that the judgment should be set aside and the matters at issue litigated in the interest of justice and fairness.

DATED this 9th day of September, 1992.

KIPP AND CHRISTIAN, P.C.

HEINZ J. MAHLER, ESQ.
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of September, 1992, I caused a true and correct copy of the foregoing MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT to be mailed, postage prepaid, to the following:

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Brenda Silcrease

Tab 5

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT Civil No. 920900571PI Judge David S. Young

Defendant, Douglas M. Baum (Baum), submits the following Memorandum of Authorities in Support of his Motion to Set Aside the Default and Default Judgment of June 16, 1992:

FACTS

1. On June 1, 1991, defendant, Douglas M. Baum, was driving a 1981 Subaru near Delle, Utah, with a passenger, Toby Slingerland, the plaintiff. The automobile was involved in a one car rollover as a result of which the plaintiff was seriously injured.

2. On January 31, 1992, plaintiff filed this action against Baum seeking damages for injuries sustained in the accident in question.

3. Baum failed to answer or otherwise respond to the Complaint filed against him due to Baum's understanding that no insurance company would cover the claim and that he had no reasonable alternative. (Affidavit of Douglas M. Baum)

4. A Certificate of Default was entered May 18, 1992 and, subsequent to a hearing, a Default Judgment was entered on June 16, 1992, in the amount of $5,623,839.00.

ARGUMENT

Rule 60(b) contemplates setting aside judgments such as this on the basis of mistake, inadvertence, excusable neglect, or other reasons in the furtherance of justice and equity. In this matter, Baum is being sued by his friend due to severe injuries sustained by Slingerland in a one car rollover accident. At the time an Answer or other response was due by Baum, Baum understood that no insurance company would cover the claim in question or provide a defense on his behalf. Baum is 22 years old, has never been sued before, and is not sophisticated as to issues of law. The attorney he consulted advised him that liability was likely and that bankruptcy may be his best alternative. Baum felt sorrow for the injuries his friend sustained. Accordingly, under the

circumstances, Baum took no action and the default and default judgment were entered.

The injuries claimed by Slingerland are substantial and serious. Defendant respectfully submits that it does not further the interest of justice and equity to allow a default judgment of $5.6 million to stand without having both sides of the controversy heard. It would be in the further interest of justice and equity to introduce evidence as to whether or not the acts or omissions on the part of Baum which resulted in the accident constitute "negligence" or other "fault" resulting in liability on the part of Baum for Slingerland's damages and injuries. It is further in the interest of justice to litigate specifically the nature and extent of the plaintiff's injuries giving defendant a fair opportunity to examine the treating physicians of the plaintiff, to have independent evaluations by other physicians concerning plaintiff's future care and treatment, as well as examining the economic damages such as lost wages and earning capacity, etc.

Baum took no action in responding to the Complaint in part because of his understanding that no insurance company was willing to provide coverage or provide a defense. At present the matter of insurance coverage for Baum in connection with this claim is the subject of litigation in the matter entitled USF&G v. Baum,

et al, filed in the United States District Court, District of Utah, Civil No. 2-92-CV-611J. (Affidavit of Douglas M. Baum)

The courts in Utah and elsewhere have traditionally disfavored the entry of judgments by default. Entry of judgment by default denies a defendant to present his side of the story, to present a defense, and to fairly and equitably examine the plaintiff's damage claims.

In Westinghouse Elec. Supply Co. v. Larsen Contractor, 544 P.2d 876, 879 (Utah 1975), the court stated:

> . . . courts generally tend to favor granting relief from default judgment where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

CONCLUSION

Defendant, Douglas M. Baum, respectfully requests an opportunity to be heard, to present a defense to the claim of liability against him, and the opportunity to examine the plaintiff and his treating physicians and other witnesses in connection with his claim for damages. These matters are in dispute, an actual controversy exists as to these issues, and justice and equity would be better served if both sides have an opportunity to be heard in a matter involving a $5.6 million claim. Accordingly, defendant respectfully requests that the default and default judgment, entered less than 90 days ago, be set aside, that defendant be

allowed to answer the Complaint and provide a defense to the allegations in question.

DATED this 9th day of September, 1992.

KIPP AND CHRISTIAN, P.C.

HEINZ J. MAHLER, ESQ.
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of September, 1992, I caused a true and correct copy of the foregoing Memorandum of Authorities in Support of Motion to Set Aside Default and Default Judgment to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Brenda Gilcrease

Tab 6

HEINZ J. MAHLER, ESQ. - #3832
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendant
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	:	AFFIDAVIT OF DOUGLAS M. BAUM Civil No. 920900571PI Judge David S. Young

(State of Utah)
: ss
(County of Salt Lake)

I, Douglas M. Baum, being first duly sworn, depose and state as follows:

1. I am the defendant in this lawsuit and have personal knowledge concerning the matters testified of herein.

2. On June 1, 1991, I was driving my car with Toby Slingerland as a passenger. I momentarily fell asleep, the car rolled, and Toby Slingerland was seriously injured in the accident.

3. Shortly after the accident, I contacted USF&G Insurance Company notifying them about the accident and requesting coverage.

4. I was informed by USF&G that they would not cover this accident.

5. Subsequently, I was served with a Summons and the Complaint in this lawsuit.

6. Because I was told that there was no coverage and because the lawsuit was filed against me by my best friend, I felt that there was nothing that I could do and, therefore, under the circumstances, I took no action.

7. I have never been sued before and I do not fully understand how the legal process works.

8. I talked to Dave Olsen, Toby Slingerland's lawyer, and as a result of these conversations, I was of the understanding that he would try to work things out with the insurance company as to coverage for Toby Slingerland's claim.

9. I also talked to a lawyer who advised me that liability is almost certain and that since the claim does not involve conduct that is non-dischargeable, that probably my best option would be to eventually file for bankruptcy.

10. Judgment was entered against me on June 16, 1992. I did not take any action to prevent judgment from being entered because I did not believe I had any viable options.

11. Subsequently, a lawsuit has been filed by USF&G against me and a Counterclaim has been filed by me in the case entitled United States Fidelity & Guaranty Company vs. Douglas M. Baum, et al. and Douglas M. Baum, and Douglas H. Baum vs. USF&G, in the United States District Court, District of Utah, Civil No. 2-92-CV-611J, as to whether or not I have insurance coverage.

12. With the situation now changed, and in order to protect my interests, I am asking that the default judgment be set aside and that I be given the opportunity to defend myself and let a jury decide whether or not my actions constitute negligence. I would also like an opportunity to have my attorney examine the evidence and if appropriate, present my own witnesses on the damage claim of Toby Slingerland.

13. Further, affiant saith naught.

Dated this 11th day of September, 1992.

Douglas M. Baum

SUBSCRIBED AND SWORN TO before me this 11th day of September,

Notary Public
BRENDA G. GILCREASE
178 East 400 South #330
Salt Lake City, Utah 84111
My Commission Expires
August 3, 1993
State of Utah

My Commission Expires:

8/3/93

Brenda Gilcrease
Notary Public
Residing at: Salt Lake County

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of September, 1992, I caused a true and correct copy of the foregoing Affidavit of Douglas M. Baum to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Brenda Hilcman

Tab 7

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	)))))))))	Civil No. 920900571PI Judge: David S. Young

MEMORANDUM IN OPPOSITION TO USF&G'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

DAVID R. OLSEN, ESQ. (2458)
JESSE C. TRENTADUE, ESQ. (4961)
of and for
SUITTER AXLAND ARMSTRONG & HANSON
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Telephone: (801) 532-7300
Attorneys for Plaintiff

TABLE OF CONTENTS

Cases

Authorities

Plaintiff, Toby Slingerland, is a twenty-one-year-old quadriplegic. Toby Slingerland, while riding as a passenger, was paralyzed in a single-car accident on June 1, 1991. Defendant Douglas M. Baum was the driver of that car. Baum drove off the highway and his car overturned. On January 31, 1992, Toby Slingerland sued Douglas Baum for the injuries which he sustained in that accident.

Douglas M. Baum failed to answer or otherwise enter a defense to Toby Slingerland's Complaint. Baum's decision not to appear and answer was based upon the actions of his insurance carrier. Douglas M. Baum's insurance carrier is United States Fidelity & Guaranty Company ("USF&G"). Baum was insured under a USF&G policy with limits of $100,000.00. USF&G three times denied coverage to Douglas M. Baum for the accident in which Toby Slingerland was paralyzed. Consequently, Baum assumed there was nothing he could do under the circumstances and he took no action to defend against the Complaint.

But Baum's decision was not made in a vacuum. He consulted an attorney who advised Baum that liability was "almost certain." Thus, rather than appear and defend at his own expense, Baum opted to allow default to be entered and to eventually file for bankruptcy. Default was entered against Baum by this Court on May 18, 1992.

On June 16, 1992, a trial on the issue of Toby Slingerland's damages was held before this Court. After hearing the testimony of witnesses and receiving exhibits into evidence, this Court entered judgment in favor of Toby Slingerland for

$5,623,839.00. USF&G attended the June 16, 1992 trial. During that trial, this Court repeatedly offered USF&G the opportunity to participate in those proceedings. USF&G, however, refused the offer.

On July 9, 1992, USF&G brought an action for declaratory relief against Douglas M. Baum, his father Douglas H. Baum, and Toby Slingerland in the United States District Court for the Central District of Utah. USF&G brought that action seeking a ruling from the federal court that it had no coverage or defense obligations to Douglas M. Baum and his father Douglas H. Baum with respect to Toby Slingerland's claims. On August 18, 1992, Douglas M. Baum and his father counterclaimed in that federal court action against USF&G. In that counterclaim, the Baum's are seeking damages for USF&G's bad faith in refusing to settle Toby Slingerland's claims for the policy limits of $100,000.00.

Immediately after that counterclaim was filed, USF&G retained counsel to represent Douglas M. Baum before this Court. Through this counsel, USF&G has filed a Motion to Set Aside Default and Default Judgment. Toby Slingerland is submitting this Memorandum in opposition to USF&G's "Motion to Set Aside Default and Default Judgment."

I.

STATEMENT OF MATERIAL FACTS

Set out hereinbelow in separately numbered paragraphs are the material facts which this Court needs to consider in ruling on USF&G's Motion. Prior to reviewing those facts, however, the Court needs to be aware of the background of law against which these facts must be considered and weighed. Specifically, the law developed under Utah Rule Civil Procedure 60(b)(1) and (7).

A. Utah Rules Of Civil Procedure 60(b)(1) And (7).

USF&G has moved under Utah Rules of Civil Procedure 60(b)(1) and (7) to set aside the Certificate of Default and Judgment entered by this Court against Douglas M. Baum. Rule 60(b) provides that this Court **"may in the furtherance of justice"** relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: **"(1) mistake, inadvertence, surprise or excusable neglect;"** . . . **"or (7) any other reason justifying relief from the operation of the judgment."** Utah Rules Civ. Pro. 60(b)(1) and (7). (Emphasis added). With respect to motions brought under Rule 60(b)(1), they must be brought "not more than three months after the judgment, order or proceeding was entered or taken." Utah R. Civ. P. 60(b). Motions brought under Rule 60(b)(7) must be brought within a reasonable time. The Utah Supreme Court has repeatedly stated, however, that a motion under Rule

60(b)(7) may not be used to circumvent the three-month filing period for "mistake, inadvertence, surprise or excusable neglect under Rule 60(b)(1). In other words, if the Motion should have been brought within three months of the entry of the order or judgment, a defendant cannot extend that time period by captioning its Motion as a Rule 60(b)(7) Motion rather than a Rule 60(b)(1) Motion. See *Larsen v. Collina*, 684 P.2d 52 (1984).

In order to prevail on its Motion under Rule 60(b)(1), USF&G must show that the Certificate of Default and/or Judgment was entered against Douglas M. Baum through mistake, inadvertence, surprise or excusable neglect, that its Motion is timely and that Baum has a meritorious defense to Toby Slingerland claims. See *State by and through D. of S.S. v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983). To prevail on its Motion brought under Rule 60(b)(7), USF&G must show that the reason for setting aside the Certificate of Default and/or Judgment is one other than those listed in subdivisions (1) through (6) of Rule 60(b); that this other reason is sufficient to justify relief from the Certificate of Default and/or Judgment; and that its Motion was brought within a reasonable time after entry of the Certificate of Default and/or Judgment. Finally, whether it is proceeding under Rule 60(b)(1) or Rule 60(b)(7), USF&G has the burden of establishing the grounds for setting aside the Certificate of Default and/or Judgment by "clear and convincing evidence." *Salle v. Howe*, 757 P.2d 154, 155 (Colo. App. 1988).

B. Material Facts.

1. On June 1, 1991, Douglas M. Baum was driving a car in which Toby Slingerland was a passenger. Baum drove off the road and the car rolled over. Toby Slingerland became a quadriplegic as a result of injuries he received in that accident. Toby Slingerland's condition is permanent and will require extensive future medical and maintenance costs.

2. In the Affidavit of Douglas M. Baum -- the only evidence that USF&G submits in support of its Motion -- Baum states that shortly after the accident, he contacted USF&G notifying them about the accident and requesting coverage. Baum further states he: **"Was informed by USF&G that they would not cover this accident."** (Baum Affidavit, ¶¶ 3 and 4). (Emphasis added).

3. Baum also states in his Affidavit that he was subsequently served with Toby Slingerland's Summons and Complaint; and that because he already had been told by USF&G that there was no coverage, **"I felt that there was nothing I could do."** Consequently, Baum says he **"took no action."** (Baum Affidavit ¶ 6). (Emphasis added).

4. Baum nonetheless asks in his Affidavit that "a jury [be allowed to] decide whether or not my actions constitute negligence." But Baum offers no evidence that would relieve him of responsibility for this accident. Instead, Baum admits liability stating that he was the driver of the car and that "[I] momentarily fell asleep, the car

rolled and Toby Slingerland was seriously injured in the accident." (Baum Affidavit, ¶ 2). Baum likewise requests an opportunity for his USF&G counsel to "examine the evidence and if appropriate, present my own witnesses on the damage claim of Toby Slingerland." (Baum Affidavit, ¶ 12). Again, Baum does not state what if any evidence he intends to proffer on the issue of Toby Slingerland's damages.

5. Baum states in his Affidavit that USF&G denied coverage for Toby Slingerland's claim. Baum neglects to include in his Affidavit the fact that USF&G attended the June 16, 1992 trial and that during the trial USF&G was given the opportunity by this Court to participate.

6. USF&G subsequently brought an action for declaratory relief against Douglas M. Baum, his father Douglas H. Baum and Toby Slingerland in the United States District Court for the Central District of Utah on July 9, 1992. In that action, USF&G is asking the federal court to declare that it owed no coverage or defense obligations to the Baums with respect to Toby Slingerland's claims.

7. The Baum's counterclaimed against USF&G on August 18, 1992. In their Counterclaim, Douglas M. Baum and Douglas H. Baum sued USF&G for the insurance carrier's bad faith refusal to settle Toby Slingerland's claims for the $100,000.00 policy limit.

II.

ARGUMENT: USF&G HAS FAILED TO MEET ANY OF THE REQUIREMENTS NECESSARY FOR THIS COURT TO SET ASIDE THE DEFAULT AND JUDGMENT UNDER RULE 60(b)(1)

In order for USF&G to prevail on its Rule 60(b)(1) Motion, it must show:

> [T]hat the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)[1]), . . . that his motion to set aside the judgment was timely; and (3) that he [Baum] has a meritorious defense to the action.

Musselman, 667 P.2d at 1055-56. USF&G must meet this burden with **"clear and convincing evidence."** *Salle*, 757 P.2d at 155. (Emphasis added). But USF&G has failed to meet its burden of proof with respect to all three elements required to set aside a judgment or order under Rule 60(b)(1).

A. USF&G Has Not Met Its Burden To Show That The Default And/Or Judgment Were Entered As A Result Of Mistake, Inadvertence, Surprise, or Excusable Neglect On The Part Of Douglas M. Baum.

The only evidence USF&G offers to show mistake, inadvertence, surprise or excusable neglect is the Affidavit of Douglas M. Baum. Yet the facts stated in Baum's Affidavit do not rise to the level of a mistake, inadvertence, surprise or excusable neglect sufficient for this Court to vacate orders and/or judgments under Rule 60(b)(1). Baum,

for example, states in his Affidavit that he was told by USF&G that there was no coverage. Hence, he **"felt that there was nothing that I could do."** (Baum Affidavit. ¶ 6). (Emphasis added).

Baum also states in his Affidavit -- and it is an important admission -- that before making the decision to do nothing he:

> [A]lso **talked to a lawyer who advised me that liability is almost certain** and that since the claim does not involve conduct that is non-dischargeable, that probably my best option would be to eventually file for bankruptcy.

(Baum Affidavit, ¶ 9). (Emphasis added). Baum thus weighed the option of going to the personal expense of hiring an attorney to defend himself on a claim of liability he now admits **"is almost certain"** against saving the cost of an attorney by not appearing and defending and then later discharging the Judgment through bankruptcy. Baum's decision not to appear and defend was thus an informed, reasoned choice, which hardly constitutes mistake, inadvertence, surprise or excusable neglect.

Moreover, Baum was placed in the position of making that choice because of USF&G's wrongful denial of coverage. While USF&G may not now be happy with Baum's choice to do nothing, this insurance company had ample opportunity to intervene on Baum's behalf prior to entry of the Judgment but knowingly chose not to. Having made that choice, USF&G cannot go back and undo its decision under the guise of "mistake, inadvertence, surprise or excusable neglect." At best, the facts which USF&G

puts forth in support of its Rule 60(b)(1) Motion show indifference and a lack of diligence on its part, which are not grounds for vacating a Judgment or Order of this Court. See *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984) (affirming entry of default judgment in similar case in which defendant felt no need to respond to the Complaint filed against him).

B. USF&G's Motion To Set Aside The Certificate Of Default Is Untimely.

Rule 60(b)(1) is clear on its face. A motion to set aside an order or other proceeding on the basis of mistake, inadvertence, surprise or excusable neglect must be brought **"not more than three months after the judgment, order or proceeding was entered or taken."** Utah Rule Civ. P. 60(b)(1). (Emphasis added). In the instant case, the Certificate of Default was entered on May 18, 1992, but USF&G's Motion was not filed until September 11, 1992. USF&G's Motion to Set Aside the Default was not filed until almost four months after entry of default and, therefore, this Court lacks jurisdiction to vacate that order of default under Rule 60(b)(1) upon the defendant meeting the standards set forth in Utah Rule Civ. P. 60(b)(1).

C. USF&G Has Failed To Meet Its Burden To Show That Baum Has A Meritorious Defense.

The third element which USF&G must meet in order to prevail on its Rule 60(b)(1) Motion is a showing that Douglas M. Baum has a meritorious defense to Toby

Slingerland's claims. This USF&G has not done. Nor could USF&G do so under the facts in this case. Douglas M. Baum clearly states in his Affidavit that he went to sleep and drove off the road (Baum Affidavit, ¶ 2) and that he was advised by his attorney that **"liability is almost certain."** (Baum Affidavit, ¶ 9). (Emphasis added). USF&G offers no facts to contradict this admission. Rather than a proffer of evidence showing a meritorious defense to Toby Slingerland's negligence claims, Baum simply states in his Affidavit that he now desires "the opportunity to defend myself and let a jury decide whether or not my actions constitute negligence." (Baum Affidavit, ¶ 12).

Similarly, Baum offers in his Affidavit no indication of a meritorious defense to Toby Slingerland's damage claims. Baum instead simply states in conclusory fashion that:

> **I would like also an opportunity to have my attorney examine the evidence** and if appropriate, present my own witnesses on the damage claim of Toby Slingerland.

(Baum Affidavit, ¶ 12). (Emphasis added). USF&G does not say what evidence it would present on Baum's behalf in contradiction of Toby Slingerland's damage claims. Furthermore, the existence of any such evidence is indeed doubtful. The Court will recall the powerful testimony and other evidence of Toby Slingerland's damages that were presented during trial, and having heard this evidence the Court knows that it cannot be contradicted.

III.

ARGUMENT: USF&G HAS FAILED TO MEET ANY OF THE REQUIREMENTS NECESSARY FOR THIS COURT TO SET ASIDE THE DEFAULT AND JUDGMENT UNDER RULE 60(b)(7)

USF&G has likewise moved to set aside the Default and Judgment on the basis of Rule 60(b)(7). This rule allows the Court to vacate orders and judgments for "any other reason justifying relief from the operation of the judgment." Utah Rule Civ. Pro. 60(b)(7). Rule 60(b)(7) is not, however, a substitute for motions brought under Rule 60(b)(1). See *Russell*, 681 P.2d at 1195 (Rule 60(b)(7) may not be resorted to for relief when the ground asserted falls within Rule 60(b)(1)). In fact, the "any other reason justifying relief" language of 60(b)(7) is actually the residuary clause under which USF&G must show:

> [T]hat the reason [for relief] . . . [is] one other than those listed in subdivisions (1) through (6); . . . that the reason[s given] justify relief; and . . . that the motion . . . [was] made within a reasonable time.

Thorpe v. Jensen, 817 P.2d 382, 387 (Utah App. 1991).

USF&G also has the burden of establishing grounds for relief under Rule 60(b)(7) with "clear and convincing evidence." *Salle*, 757 P.2d at 155. (Emphasis added). But once more USF&G has not met its burden. USF&G offers no evidence showing "any other reason justifying relief" under Rule 60(b)(7). More importantly, the

Utah Court of Appeals has cautioned that in applying Rule 60(b)(7) lower courts should proceed "very cautiously;" that these grounds for vacating orders and judgments should be used "sparingly;" and that relief from orders and judgments under Rule 60(b)(7) should occur "only in unusual and exceptional circumstances." *Thorpe v. Jensen*, 817 P.2d at 387 (Utah App. 1991). In the instant case, USF&G has failed to identify any reason justifying the relief it requests.

IV.

CONCLUSION

USF&G has failed to meet its burden of proof on the Motion to Set Aside Default and Default Judgment. USF&G has failed to provide the Court with clear and convincing evidence of mistake, inadvertence, surprise, excusable neglect or any other reason justifying relief under Rules 60(b)(1) and (7) of the Utah Rules of Civil Procedure. With respect to the Certificate of Default, USF&G's Motion is likewise untimely, having been brought more than three months after that default was entered. Lastly, USF&G has failed to make any showing that Baum has a meritorious defense to the underlying action.

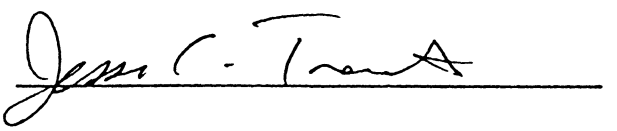
DATED this 22nd day of September, 1992.

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be hand-delivered this 22nd day of September, 1992, to:

Heinz J. Mahler, Esq.
KIPP & CHRISTIAN, P.C.
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314



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Tab 8

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	:	RESPONSE MEMORANDUM TO PLAINTIFF'S MEMORANDUM OPPOSING SETTING ASIDE DEFAULT AND DEFAULT JUDGMENT Civil No. 920900571PI Judge David S. Young

Defendant Douglas M. Baum submits this Response to Plaintiff's Memorandum Opposing Setting Aside the Default and Default Judgment:

ARGUMENT

It should first be noted that plaintiff's Memorandum is entitled Memorandum in Opposition to "USF&G's" Motion to Set Aside Default and Default Judgment. The entire memorandum contains arguments against "USF&G", concluding with the statement that "USF&G" has failed to meet its burden and that "USF&G's" Motion to Set Aside the Default and Default Judgment should be denied. USF&G is not a party in this lawsuit. The Motion to Set Aside Default

and Default Judgment was filed by Douglas M. Baum, the defendant, and not USF&G. Since the entire memorandum is directed against USF&G and not against the defendant who is seeking to set aside this default, all arguments in the memorandum are without merit, are directed against a non-party, and should not be considered by this court.

The Affidavit of defendant Douglas M. Baum honestly and clearly presents to the court the circumstances, under which a default judgment was entered. Mr. Baum is a young man who was faced with a situation where he was being sued by his best friend who had sustained serious injuries in an auto accident. Mr. Baum is unsophisticated in connection with legal matters and has never been involved in a lawsuit. Mr. Baum was advised by USF&G that no coverage was provided for this claim. As a result of conversations with Dave Olsen, plaintiff's attorney, Mr. Baum was of the understanding that Mr. Olson would attempt to work things out with USF&G in connection with coverage for Toby Slingerland's claim. In reviewing this matter with an attorney, Mr. Baum was advised that liability was almost certain and that perhaps his best option would be to eventually file for bankruptcy. Given these facts as a whole, it is not difficult to understand why when subsequently served with a Summons and Complaint, that Mr. Baum took no action and allowed the default judgment to be entered against him, which

situation constitutes excusable neglect on the part of Mr. Baum and was due in part to mistaken beliefs on the part of Mr. Baum.

Litigation is now pending between Mr. Baum, USF&G, and others as to whether or not the claim of Mr. Slingerland is covered by a policy of insurance. Defense counsel has now been retained for Mr. Baum and thus, Mr. Baum respectfully requests that this court allow him to proceed with reasonable discovery and put on a reasonable defense.

In his memorandum, plaintiff claims that Baum has failed to provide any "evidence" as a basis for challenging liability or damages. This argument is, however, without basis in logic. Baum cannot provide any evidence unless he is given an opportunity to proceed with discovery. There is no doubt that the plaintiff suffered significant damages. However, the extent of those damages has only been presented by one side. Mr. Baum should have the opportunity to cross-examine the treating physicians and other witnesses that will testify or have knowledge concerning Mr. Slingerland's injury and how it will effect the balance of his life, as well as all witnesses in connection with economic damages. Mr. Baum should have the opportunity, if appropriate, to provide his own witnesses on the issue of medical and economic damages.

Plaintiff also claims that Mr. Baum does not have a meritorious defense. That is a question that should be left for a

jury to decide. Although Mr. Baum was driving the vehicle at the time of the accident, Mr. Baum and Mr. Slingerland jointly agreed and decided to make a late night trip to Wendover, both decided to go a substantial period of time without sleep, and it was by agreement that Mr. Baum was driving at the time the accident. The factors which contributed to Mr. Baum falling asleep resulting in the accident were joint decisions by both Mr. Slingerland and Mr. Baum. The causes which resulted in the accident were the result of mutual agreements. A jury should have the opportunity to determine whether or not Mr. Slingerland is partially at fault and to what degree for the causes that resulted in the accident. Further, it should be a question for the jury as to whether or not Mr. Baum's falling asleep under the circumstances rises to the level of "negligence" under instructions to be given to a jury.

Mr. Baum's Motion to Set Aside the Default and Default Judgment was made within 90 days of the time that the Default Judgment was entered and within a reasonable time of the Default Certificate having been signed by the clerk of the court. Plaintiff has not shown, nor has he even claimed in his Memorandum, any prejudice that would result if the default is set aside. Plaintiff's claim will still be viable. It would be subject to proof and cross-examination. Mr. Baum respectfully submits that it would be in the interest of justice to set aside the default

judgment in light of the facts as outlined above and in light of the substantial amount of damages at issue and that he be given an opportunity to provide a defense to this claim. Defendant's Motion to Set Aside the Default and Default Judgment should, therefore, be granted.

DATED this 28th day of September, 1992.

KIPP AND CHRISTIAN, P.C.

HEINA J. MAHLER, ESQ.
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28th day of September, 1992, I caused a true and correct copy of the foregoing Response Memorandum to Plaintiff's Memorandum Opposing Setting Aside Default and Default Judgment to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Brenda Mikesell

Tab 9

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
SLINGERLAND, TOBY SCOTT	:	
PLAINTIFF	:	CASE NUMBER 920900571 PI
	:	DATE 10/07/92
VS	:	HONORABLE DAVID S. YOUNG
	:	COURT REPORTER
BAUM, DOUGLAS M	:	COURT CLERK NP
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. OLSEN, DAVID R.
D. ATTY. MAHLER, H.; JOHNSON, G.;

SWORN AND EXAMINED

OTHERS: JACKSON, W. K.

THE DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT ENTERED IS DENIED. THE COURT HAS REVIEWED THE PLEADINGS AND IS CONVINCED THAT THERE IS NO APPROPRIATE BASIS UNDER RULE 60 (B) TO GRANT THE MOTION. ALL CONCERNED WERE WELL AWARE OF THE PROCEEDINGS, OR REASONABLY COULD HAVE BEEN WITH PROPER ATTENTION AND THUS THE MOTION IS DENIED. MR. OLSEN IS REQUESTED TO PREPARE AN ORDER CONSISTENT HEREWITH AND WITH HIS PLEADINGS.

ORAL ARGUMENT ON THE MOTION IS DENIED. THE COURT FEELS THAT THE MATTER HAS BEEN FULLY BRIEFED AND CAN BE THUS SUBMITTED ON THE PLEADINGS.

C.C. TO COUNSEL

Tab 10

DAVID R. OLSEN, ESQ. (2458)
JESSE C. TRENTADUE, ESQ. (4961)
of and for
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	)	ORDER Civil No. 920900571PI Judge: David S. Young

Defendant's Motion to Set Aside Default and Default Judgment was duly considered by the Court. The parties filed memoranda and affidavits in support of their respective positions. The Court being fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion to Set Aside Default and Default Judgment be, and the same hereby is, denied.

DATED this 19th day of October, 1992.

BY THE COURT:

/s/

DAVID S. YOUNG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be mailed, first class postage prepaid, this 19th day of October, 1992, to:

Heinz J. Mahler, Esq.
KIPP & CHRISTIAN, P.C.
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314

Gary L. Johnson, Esq.
RICHARDS BRANDT MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144

W. Kevin Jackson, Esq.
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
311 South State, Suite 380
Salt Lake City, Utah 84111

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Tab 11

HEINZ J. MAHLER, ESQ. - #3832
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendant
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND,	:	OBJECTION TO PROPOSED ORDER
Plaintiff,	:	
vs.	:	
DOUGLAS M. BAUM,	:	Civil No. 920900571PI
Defendant.	:	Judge David S. Young

Defendant Douglas M. Baum objects to plaintiff's proposed Order denying defendant's Motion to Set Aside Default and Default Judgment, which Order has been submitted by plaintiff. This Objection is based upon the fact that the Order is not sufficiently definite and clear in outlining the court's basis and facts relied upon in denying the Motion to Set Aside the Default and Default Judgment.

This court may, in its discretion under Rule 52, Utah Rules of Civil Procedure, enter specific Findings of Fact and Conclusions of Law. Defendant respectfully requests that the court

enter specific Findings of Fact and Conclusions of Law providing in detail the facts upon which the court relied and based its denial of defendant's Motion to Set Aside the Default and Default Judgment.

DATED this 20th day of , 1992.

KIPP AND CHRISTIAN, P.C.

HEINZ J. MAHLER, ESQ.
Attorneys for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of October, 1992, I caused a true and correct copy of the foregoing Objection to Proposed Order to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Brenda Kilcrease

Tab 12

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
SLINGERLAND, TOBY SCOTT	:	
PLAINTIFF	:	CASE NUMBER 920900571 PI
	:	DATE 11/05/93
VS	:	HONORABLE DAVID S. YOUNG
	:	COURT REPORTER
BAUM, DOUGLAS M	:	COURT CLERK NP
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. OLSEN, DAVID R.
D. ATTY. MAHLER, HEINZ J.

THE NOTICE TO SUBMIT DEFENDANT'S "OBJECTION TO PROPOSED ORDER" HAS BEEN FILED NOVEMBER 2, 1992. THE COURT DECLINES TO FURTHER ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW. MR. OLSEN'S RESPONSE IN BEHALF OF THE PLAINTIFF IS SUFFICIENT. THE OBJECTIONS ARE DENIED. MR. OLSEN IS REQUESTED TO PREPARE AN ORDER CONSISTENT HEREWITH AND WITH HIS PLEADINGS ON FILE.

C.C. TO COUNSEL

Tab 13

DAVID R. OLSEN, ESQ. (2458)
JESSE C. TRENTADUE, ESQ. (4961)
of and for
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

TOBY SCOTT SLINGERLAND, Plaintiff, vs. DOUGLAS M. BAUM, Defendant.	)	**ORDER DENYING DEFENDANT'S OBJECTION TO PROPOSED ORDER** Civil No. 920900571PI Judge: David S. Young

---

Defendant's Objection to the Proposed Order was filed in this Court on October 21, 1992. A Notice to Submit was filed on November 2, 1992. The Court being fully advised in the premises, it is hereby ORDERED:

1. Defendant's Objection to the Proposed Order is denied.

2. The Order Denying Plaintiff's Motion to Set Aside Default and Default Judgment shall be deemed signed and entered effective as of the date of this Order Denying Defendant's Objection to Proposed Order.

DATED this 1 day of ~~November~~ Dec., 1992.

BY THE COURT:

/s/

HONORABLE DAVID S. YOUNG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be mailed, first class postage prepaid, this 12th day of November, 1992, to:

Heinz J. Mahler, Esq.
KIPP & CHRISTIAN, P.C.
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111-2314

Gary L. Johnson, Esq.
RICHARDS BRANDT MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144

W. Kevin Jackson, Esq.
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
311 South State, Suite 380
Salt Lake City, Utah 84111

DRO20 26

Tab 14

HEINZ J. MAHLER, ESQ. - #3832
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendant
175 East 400 South, #330
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TOBY SCOTT SLINGERLAND,	:	NOTICE OF APPEAL
Plaintiff,	:	
vs.	:	
DOUGLAS M. BAUM,	:	Civil No. 920900571PI
Defendant.	:	Judge David S. Young

Notice is hereby given that defendant and appellant, Douglas M. Baum, through counsel, Heinz J. Mahler of Kipp and Christian, P.C., appeals to the Utah Court of Appeals the Default and Default Judgment entered against defendant on June 17, 1992 and final Order denying defendant's Motion to Set Aside Default and Default Judgment entered in this matter on October 19, 1992. Defendant's Rule 52(b) Motion filed in connection with said Order was denied on December 1, 1992.

The Appeal is taken from the entire judgment.

DATED this 18th day of December, 1992.

KIPP AND CHRISTIAN, P.C.

Heinz J. Mahler
Attorney for defendant
Douglas Baum

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of December, 1992, I caused a true and correct copy of the foregoing Notice of Appeal to be mailed, postage prepaid, to the following:

David R. Olsen, Esq.
Jesse C. Trentadue, Esq.
SUITTER AXLAND ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

W. Kevin Jackson
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
311 South State Street
Suite 380
Salt Lake City, Utah 84111

Brenda Gleave

JUDICIAL 330–STATE OF UTAH–UNDERTAKING FOR COSTS ON APPEAL (6-83)

3rd Judicial Bond #71-0160-13850-92-4

IN THE DISTRICT COURT OF THE COUNTY OF SALT LAKE

STATE OF UTAH

Toby Scott Slingerland — Plaintiff

vs.

Douglas M. Baum — Defendant

UNDERTAKING FOR COSTS ON APPEAL

Case #920900571PI

WHEREAS, the Defendant above named, in the above entitled action, has appealed to the Supreme Court of the State of Utah, from a Judgment made and entered against it in said action in said District Court, in favor of the Plaintiff on the day of 19 , for Dollars, ($), costs, and interest at per cent. from 19 , and from the whole thereof.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned, the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and having complied in all respects with the laws of the State of Utah, so as to be entitled to do business in said State, does hereby undertake and promise on the part of the appellant ,

that the said appellant will pay all damages and costs which may be awarded against on the appeal, or on a dismissal thereof, not exceeding

Three Hundred and 00/100---------- Dollars, ($ 300.00)

to which amount the undersigned acknowledges itself bound.

Dated and signed this 8th day of December , 19 92 .

UNITED STATES FIDELITY AND GUARANTY COMPANY

By.....
Kenneth Osborne, Attorney-in-fact.

.....

STATE OF UTAH, } ss:
COUNTY OF SALT LAKE }

Kenneth Osborne being first duly sworn, on oath deposes and says, that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that he is duly authorized to execute and deliver the foregoing obligation; that said Company is authorized to execute the same, and has complied in all respects with the laws of Utah in reference to becoming sole surety upon bonds, undertakings and obligations.

.....
Kenneth Osborne

Subscribed and sworn to before me this 8th day of December A. D. 19 92 .

NOTARY PUBLIC
ELIZABETH POTTS
8230 South Romaine Dr.
Sandy, Utah 84070
My Commission Expires

CERTIFIED COPY

GENERAL POWER OF ATTORNEY

No. 85507

Know all Men by these Presents:

That UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint

Kenneth Osborne

of the City of Salt Lake City, State of Utah
its true and lawful attorney in and for the State of Utah

for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said UNITED STATES FIDELITY AND GUARANTY COMPANY, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said

Kenneth Osborne

may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said UNITED STATES FIDELITY AND GUARANTY COMPANY has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 17th day of January, A. D. 19 75

UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Signed) By.... John Hamilton
Vice-President.

(SEAL) (Signed). W. G. Hilyard
Assistant Secretary.

STATE OF MARYLAND, BALTIMORE CITY, } ss:

On this 17th day of January, A. D. 1975, before me personally came John Hamilton, Vice-President of the UNITED STATES FIDELITY AND GUARANTY COMPANY and W. G. Hilyard, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said John Hamilton. and W. G. Hilyard were respectively the Vice-President and the Assistant Secretary of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so fixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first day in July, A. D. 19.78.....

(Signed) Herbert J. Aull
Notary Public.

(SEAL)

STATE OF MARYLAND, BALTIMORE CITY, } Sct.

I, Robert H. Bouse, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that Herbert J. Aull, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 17th day of January, A. D. 1975

(Signed) Robert H. Bouse